

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

January 19, 2001 Session

**IN THE MATTER OF: S.M.K and R.A.K., MELISSA MCKINNEY v.  
STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES,**

**Appeal from the Juvenile Court for Greene County  
No. 13115     Hon. Thomas Wright, Judge**

**FILED FEBRUARY 1, 2001**

**No. E2000-02718-COA-R3-CV**

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The State of Tennessee, Department of Children's Services, petitioned to terminate the Mother's parental rights to an eight year old child and a three year old child. The record shows by clear and convincing evidence that termination of the Mother's parental rights is in the best interest of the children under the standards set forth in Tenn Code Ann. § 36-1-113. We affirm the Judgment of the Trial Court.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed; Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Kenneth N. Bailey, Jr., Greeneville, TN, for the Appellant, Melissa McKinney.

Paul G. Summers, Attorney General, and Elizabeth C. Driver, Assistant Attorney General, Nashville, for the Appellee, State of Tennessee.

**OPINION**

**Background**

\_\_\_\_\_ This appeal results from the decision of the Greene County Juvenile Court to terminate the parental rights of Appellant Melissa McKinney ("Mother") to two of her children ("S.M.K." and "R.A.K."). The Juvenile Court specifically found that under the provisions of Tenn. Code Ann. § 36-1-113(g)(3)(A) and § 36-1-113(g)(2), there was clear and convincing evidence that termination was in the children's best interest.

These two children have been under the care of the Department of Children's Services ("DCS") and in foster care for much of their young lives. DCS of Greene County, Tennessee has been involved with the family since January 20, 1998. Prior to that, the Hamblen County Juvenile Court had ordered that DCS of Hamblen County, Tennessee assume custody of all four of Mother's children, who are now eight, seven, five and three years old, on two occasions. Hamblen County DCS returned the children to the Mother for a trial period on June 25, 1997. Mother promptly moved with the children to Greene County, and Hamblen County DCS transferred the case to Greene County DCS for continuing supervision.

In keeping with the State's policy of attempting to return all children to their natural parents whenever possible, a permanency plan was adopted. This permanency plan required Mother to attend individual, family and group counseling; to protect her children from child abuse from any perpetrator; to demonstrate that she could provide for their basic needs, including housing, clothes and food; to maintain adequate housing for a period of at least six months; to maintain regular contact with the children through letters, phone calls and visitation; and to obtain a divorce.

Mother had physical custody of her four children under that permanency plan for less than a month when, on July 18, 1997, she took her oldest son, S.M.K., then five years old, to the office of her family physician, Dr. Orville Swarner, because she suspected that S.M.K. had been sexually abused. S.M.K. had reported to his mother, in a child's language, that his babysitter had sodomized him. Medical examination of S.M.K. revealed blood in his stool and fresh blood and tears around his anus, all suggestive of sexual abuse. Dr. Swarner's nurse reported the incident to DCS, which brought S.M.K. back to Dr. Swarner's office the next day for another examination and interview, in which the child told the same story to DCS workers.

Another one of Mother's children, a five-year-old female,<sup>1</sup> began seeing the same physicians group when she was seven months old, after she was brought in very weak, malnourished, and at less than the fifth percentile of weight for her age. She had been found living in a car with Mother and was diagnosed as "failure to thrive." On January 19, 1998, this child's grandmother brought her to Dr. Swarner's office because the grandmother suspected sexual abuse by the teenage son of Mother's boyfriend. At that time, Mother, her four children, her boyfriend and her boyfriend's teenage son were all living together. Medical examination of the five-year-old female child revealed that she had a swollen vaginal area, swollen labia and very obvious redness around the labia, all findings suggestive of sexual abuse. The child described in detail the alleged abuse, telling the nurse that two boys, whom she named, had "taped her mouth shut and hurt her." She said that her mother was in the house sleeping when the incident occurred. She also complained to the nurse about being fed dog food on the floor by her Mother. A Greene County DCS worker and a

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<sup>1</sup>She is not the subject of this petition to terminate parental rights. The original Petition for Temporary Custody resulted in the removal of all four children from Mother's custody. However, in this appeal, we address only the termination of Mother's parental rights to two of those children, an eight-year-old male and his three-year-old brother.

Greene County detective performed a home visit, where they found Mother asleep and her children unsupervised. There was very little food in the house and the house was unclean and unsafe.

DCS filed a Petition for Temporary Custody of the four children in the Juvenile Court for Greene County the next day, January 20, 1998. The petition alleged, in addition to the possibility of sexual abuse, that Mother's compliance with the plan of care had been marginal and that the children were in immediate danger. DCS took custody of the four children pursuant to a Protective Custody Order and placed them in temporary foster care. A guardian ad litem was appointed. During this time, the children were interviewed by DCS workers. They told the interviewers that their Mother had fed them on the floor with canned dog food which she had mixed with chocolate milk. If the children refused to eat the dog food, Mother would dump it on their heads.<sup>2</sup> One of the children told a DCS worker that Mother gave S.M.K. a pill which made him sleepy. A drug screen performed the next day on S.M.K. was positive for the presence of Tofranil, a prescription anti-depressant.

S.M.K., who was then six years old, was transferred from regular foster care to a Therapeutic Foster Care Program in June 1998 because he had been sexually acting out with his four year old sister in foster care. His younger brother, R.A.K, who is also the subject of this petition to terminate parental rights, was six months old when he was placed in foster care. He had been diagnosed with failure to thrive and was very developmentally delayed. He could not hold his head up or sit up. Mother's fourth child, who is not the subject of this termination petition, has been diagnosed with dwarfism. His grandmother first brought him to the doctor for diagnosis and care, and she advised the doctor that "there was a horrible drug problem within the family" and that mother had abandoned the child. The record indicates that the children were passed around among various family members for care until DCS became formally involved and placed them in foster care.

The Greene County Juvenile Court conducted a hearing on September 30, 1998 to review the foster care status of the children. Mother appeared with counsel and was ordered to provide a medical report regarding the diagnosis and treatment of her sleeping disorder and a report from her counselor describing her treatment issues and progress. DCS was ordered to do a home study on Mother's home and provide a report from a therapist describing the treatment and progress of the children. Mother was given supervised visitation every other Wednesday for two hours. She had nine visits scheduled. She missed three of these visits. On one occasion, she said she had car trouble. On the other two scheduled visits, she simply did not show up. Ms. Mary Garland, a registered nurse with the Infant and Toddler Program at Laughlin Memorial Hospital, attempted to meet with Mother on numerous occasions to help her learn about caring for the children, but would often go to the home and find Mother not home, no adult at home, and the children alone or left with older children. "The little boy brought me maggots out to play with and called them little worms . . . a lot of time there was no food in the refrigerator . . . home very dirty . . . missed medical

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<sup>2</sup>The DCS worker asked one of the children to describe the dog food can, then went to the grocery store and found cans of dog food which matched the description provided by the child.

appointments . . . [daughter] told me that Mother said Santa broke his leg and wouldn't be coming." On one occasion, she looked for food in the house and found one piece of cake in the refrigerator.

The Juvenile Court conducted another review on January 27, 1999 to determine the degree of compliance of the parties to the foster care plan. The Court found that DCS was in compliance with the foster care plan but Mother was not in compliance with any part of the plan. DCS workers testified that Mother would disappear for long periods of time, so that DCS was unable to find her for follow-up visits. She failed to maintain a home which the children could reasonably be expected to live in. During this hearing, Mother became concerned that her parental rights might be terminated, walked out of the courthouse during the proceedings, and did not return. Based on all these facts, the Juvenile Court found that the plan and goal of DCS to return the children to Mother was not appropriate, and that the new goal would be to terminate Mother's parental rights so that the children could be considered for adoption.

When the final hearing on the DCS Petition to Terminate Parental Rights was held on May 18, 2000, Mr. Juan Luvene, the Case Manager, testified that, to his knowledge, Mother has not attended individual, family or group counseling as required by her parenting plan. She has not provided adequate housing, clothing and food for the children. He could not help her with this, because he "could never keep her at one place long enough to get anything started." She would bounce from Morrisotwn to Greeneville and back and forth. In the 17 months immediately preceding the hearing, Mother had lived in at least four different locations. He characterized her visits with the children as "just token visits," meaning that "sometimes she would show up. Sometimes she wouldn't show. Sometimes she would show late. Sometimes she would call like an hour before and say she couldn't come. So, sometimes the kids would be there and she wouldn't be there. Of course, that would disrupt them."

Mother testified that she had purchased a used trailer in anticipation of possibly getting physical custody of her children. When she bought the trailer, it had no floor, no ceiling, and no bathroom. She testified that she paid more than \$24,000 for the trailer and that she had made repairs to make it habitable. When asked about the history of her children's foster care, she replied that "to tell you the truth, I don't know who had them when they had them. I do know that they've had them in Ohio. They've had them in Greeneville and in Morristown and here and there." She denied giving her medication to the children or feeding them dog food and told the Court that the children had lied. She recited an employment history of having four jobs over a two-year period, none of which lasted more than a couple of months. At the time of the hearing, her income was derived from selling scrap steel that her father had accumulated on his farm. Her annual income for the most recent two years was less than \$2,000 each year. She told a DCS worker that she was concerned when one of the children was removed from her care because she "needs ["B"] home because she needs his money . . . [AFDC payments]." When Mother's testimony did not coincide with earlier testimony by caseworkers and nurses, she was asked whether she had lied to the Court in the past. She replied: "Yes, well I told them that I said something and it - I didn't quite put it in the words that I thought I had. He listened to his tapes." She also admitted having been held in

contempt of court and spending 48 hours in jail for leaving the courthouse during a prior hearing in this case.

The children's guardian ad litem testified that he had investigated the children's situation while in Mother's custody as well as their foster care situations. The guardian ad litem testified he could not recommend either of the children ever going back to the custody of Mother, and that they were in excellent foster care situations at the time of the hearing.

The Trial Court found by clear and convincing evidence that the State's witnesses were credible and that Mother's testimony, to any extent that it conflicted with the State's witnesses, was not credible. He found that the conditions which led to the removal of the children persisted, that in all probability those conditions would subject the children to further neglect and abuse if they were to be returned, and that there is little likelihood that the conditions would be remedied at an early date that would allow reunion of Mother with the children. The Court described, at length, the conditions under which the children were living whenever they were in Mother's custody, and found it in S.M.K.'s and R.A.K.'s best interest to terminate Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113 (g)(3)(A)(i)(ii)(iii) and § 36-1-113(g)(2).

### **Discussion**

Mother appeals and raises only the issue of whether the Juvenile Court erred in finding that the Department of Children's Services proved by clear and convincing evidence that termination of her parental rights was in the children's best interest. Our review is *de novo* upon the record, accompanied by a presumption of the correctness of the findings of fact of the Juvenile Court, unless the preponderance of the evidence is otherwise. Rule 13(d), T.R.A.P.; *Davis v. Inman*, 974 S.W.2d 689, 692 (Tenn. 1998). The Juvenile Court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *Wyatt v. State*, 24 S.W.3d 319 (Tenn. 2000).

The Termination of Parental Rights statute, Tenn. Code Ann. § 36-1-113, provides that termination of parental or guardianship rights must be based upon: (1) a finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) that termination of the parent's or guardian's rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c). Moreover, before a parent's rights can be terminated, there must be a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated. *In Re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *In the Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998); *Petrosky v. Keene*, 898 S.W.2d 726, 728 (Tenn. 1995).

This Court discussed the "clear and convincing evidence" standard in *O'Daniel v. Messier*, 905 S.W.2d 182 (Tenn. Ct. App. 1995):

The “clear and convincing evidence” standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). While it is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, 455 U.S. at 766, 102 S.Ct. at 1401; *Rentenbach Eng’g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App. 1987).

Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. *See Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992). It should produce in the fact-finder’s mind a firm belief or conviction with regard to the truth of the allegations sought to be established. *Brandon v. Wright*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

*O’Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

- (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;
- (2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;
- (3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
  - (i) The conditions which led to the child’s removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child’s safe return to the care of the parent(s) still persist;

- (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
- (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

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Tenn Code Ann. § 36-1-113(g). That statute also describes the standard for determining whether termination is in the best interest of the Child in such cases:

- (i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
  - (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
  - (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
  - (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
  - (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
  - (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
  - (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward other children in the family or household;
  - (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or

whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i). The statute also requires the trial court to enter an Order which makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing. Tenn. Code Ann. § 36-1-113(k).

In this case, Mother argues that the State failed to prove by clear and convincing evidence that termination of her parental rights is in S.M.K.'s and R.A.K.'s best interest. The Juvenile Court found, and our review of the record confirms, that the proof is more than clear and convincing, it is overwhelming, that the best interests of these two children require the termination of Mother's parental rights. There is no proof that Mother has made any adjustment of her circumstances which would make it safe for the children to be in her home. She has repeatedly been offered assistance by various medical and social services agencies, yet we find no evidence that a lasting adjustment appears reasonably possible in this case. When she was offered visitation, she failed to keep her appointments. The children have been in foster care for so long that we cannot imagine that any meaningful relationship could possibly exist at this time between them and Mother. DCS workers testified that the children were upset by visitation. A change in caretakers and physical environment back to the Mother would undoubtedly result in severe emotional, psychological, and perhaps physical injury to the children. Mother has failed to protect the children from abuse and has herself engaged in neglect and abuse toward her children. The children's grandmother told DCS workers that there was a serious drug problem in the family, and DCS workers repeatedly found Mother asleep on the couch or not in the home when they appeared for home visits. The record shows Mother has provided only a few small token gifts on rare occasions, such as Halloween masks and the like, and has never offered or attempted to provide any meaningful support to the children under any circumstances. In fact, the evidence shows that Mother views her children as a source of income.

As stated, certain factors weighing on what is in the best interest of the Child are statutorily described in Tenn. Code Ann. § 39-1-113(i). The evidence in this case is clear and convincing that this situation meets most, if not all, of those nine statutory factors. Moreover, it is clear to this Court that substantial harm to these children will result if the parental rights of Mother



are not terminated. *In Re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). Accordingly, we find the Trial Court correctly terminated Mother's parental rights to S.M.K. and R.A.K.

### **CONCLUSION**

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellant, Melissa McKinney.

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D. MICHAEL SWINEY, JUDGE